

<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

basis for Dr. Bieri's 5 percent whole body rating for claimant's "disturbance of mental status and integrated functioning."<sup>2</sup> The ALJ denied future medical treatment.

Claimant asserts her PPD should include Dr. Bieri's 5 percent rating for her alleged mental and emotional disturbance because it was based on the opinion of Dr. Wang,<sup>3</sup> a neuropsychologist. Claimant contends Dr. Fevurly's opinions lack credibility because, although the doctor did not rate claimant's mental health issues, he nevertheless concluded such issues made claimant's recovery more difficult.

Claimant further maintains respondent offered no evidence to contradict Dr. Bieri's 5 percent rating for her TMJ syndrome, thus rendering Dr. Bieri's opinion on that issue undisputed.<sup>4</sup>

Regarding future medical treatment, claimant insists Dr. Bieri opined claimant will need future care for her TMJ syndrome and dental injuries, and may also require psychiatric evaluation and treatment. Claimant requests the Board increase her award to 15 percent whole person functional impairment (5 percent each for claimant's cervicothoracic injury, mental/emotional injury and TMJ syndrome with dental injuries) and to leave open her right to seek future treatment.

Respondent maintains Dr. Wang found no neuropsychological evidence of brain injury and that Dr. Bieri is not qualified to express opinions about claimant's alleged psychological injury. Respondent relies on Dr. Fevurly's opinions that claimant's mental/emotional issues, and any TMJ syndrome, are unrelated to her accidental injury. Respondent argues Dr. Fevurly correctly opined the proper rating for claimant's alleged TMJ is zero percent. Finally, respondent advances the position that claimant failed to overcome the presumption that respondent's obligation to provide medical treatment was terminated when she reached maximum medical improvement (MMI). Respondent urges the Board to uphold the ALJ's decision.

The issues are:

1. What is the nature and extent of claimant's disability?
2. Is claimant entitled to future medical treatment?

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<sup>2</sup> ALJ Award (Mar. 3, 2016) at 7.

<sup>3</sup> Dr. Wang did not testify and her report is not in evidence.

<sup>4</sup> See *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P. 2d 1036 (1978). Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.

**FINDINGS OF FACT**

Claimant worked for respondent as a pet stylist, a position that required her to groom, cut and style customers' pets. On January 6, 2013, a 50-pound dryer fell, striking claimant on top of her head and her left side, including her face, left shoulder and left arm. Claimant testified her accident caused broken teeth, loss of memory, difficulty sleeping, and pain in her head, neck, left shoulder and mid-back.

Claimant was initially authorized to treat with Mercy West Occupational Medicine,<sup>5</sup> where she received medication and physical therapy that claimant testified helped. According to claimant, a physical therapist suggested that if she had \$500,<sup>6</sup> to try chiropractic treatment. Claimant testified her chiropractic treatment seemed to help, but the \$500 did not go far. According to claimant, one of the medical providers told her she "had crunched a vertebra in my neck when [the dryer] fell on my head."<sup>7</sup>

Claimant was seen by Dr. Rahila Andrews,<sup>8</sup> who recommended a neurological consultation. Claimant was apparently evaluated and treated by Dr. Welch, a neurologist, although his records are not in evidence. Claimant was evaluated by Dr. Lee Wang, a neuropsychologist, who apparently initiated psychological testing that was not completed.

Claimant testified some of her teeth were broken completely out in the accident, and other teeth were fractured. Claimant apparently received extensive dental care and TMJ treatment from Drs. Poulson, Wisdom and Vail, all dentists. It is difficult to discern the precise nature of the dental and TMJ treatment claimant received because no records of such treatment are in evidence.

Claimant testified she continues to experience headaches, at times severe; loss of memory; jaw popping, spasms and pain in her left TMJ; continuing dental problems; neck pain and left shoulder pain. According to claimant, her jaw feels tight and she believed her TMJ injury caused further damage to her teeth. Claimant also believed that after the removal of her damaged teeth, most of her headaches now result from her TMJ syndrome.

Claimant testified about her psychological problems:

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<sup>5</sup> Medical records from this provider are not in evidence.

<sup>6</sup> Presumably a reference to the \$500 unauthorized medical allowance provided for in K.S.A. 44-510h(b)(2).

<sup>7</sup> R.H. Trans. at 16.

<sup>8</sup> Dr. Andrews did not testify and her report is not in evidence. See R.H. Trans. at 6-7.

Q. And you talked about depression. Do you have other issues in your life that cause you to be depressed or do you think it's only the pain?

A. It's mostly the pain. I feel like the majority of my relationships are hanging by a thread and in all honestly I don't blame people. It's because I am either in pain all the time or crying and people just – people don't want to deal with it. I mean, it's old for me. I'm sure it's old for them.<sup>9</sup>

At respondent's request, Chris D. Fevurly, M.D., a physician board certified by, or associated with, a number of organizations, including the American Academy of Disability Evaluation Physicians (AADEP), examined claimant on March 13, 2014. Dr. Fevurly took a history, reviewed medical records and conducted a physical examination. He diagnosed a closed head trauma, an acute cervical strain, and a major depressive disorder. The latter diagnosis was based on a report of Dr. Wang that is not in the record. Dr. Fevurly testified claimant's depression was not work-related.

Based on the *Guides*, Dr. Fevurly rated claimant's cervicothoracic injury at 5 percent permanent impairment to the whole body.

Regarding claimant's TMJ and dental issues, Dr. Fevurly testified there is nothing specific in the *Guides* about rating dental injuries. The ear, nose and throat section of the *Guides*, Table 6, page 231, discusses impairment of mastication (chewing) and deglutition (swallowing), neither of which apply to claimant. Dr. Fevurly testified:

A. . . . I've looked at dental issues in the Fourth Edition before, and other than one chart on deglutition, which is chewing, or you know eating, there's nothing in here specifically about dental problems and it's rateability using the Fourth Edition.

Q. Is there anything in there about jaw pain or headaches caused by TMJ or anything of that nature?

A. Yeah. Yeah, there is for TMJ. . . . Because when you get into the ear, nose and throat section, it talks about the face, which would be the jaw, and then there's a discussion of mastication and deglutition, which has to do with the act of eating, and that's Table 6 on page 231, . . . I don't think any of that applies to her currently.

Q. Did you form an opinion as to what was causing her headaches that she claims to have?

A. Well, I think that she - - she probably has some headaches related to her teeth, but I think she has kind of stress or muscle tension type headaches. I don't think she meets the criteria for migraines.

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<sup>9</sup> *Id.* at 22-23.

Q. And what type of headaches can problems with your teeth, like TMJ problems or broken teeth or nerve problems in your teeth - -

A. Right.

Q. - - nerve root problems in your teeth, what type of headaches can you get from those, do you know?

A. I think those would probably fit into kind of a muscle tension type headache. If you have a jaw problem, I mean, like a TMJ problem, you can get headaches from that, and that would probably be a mechanical type headache or muscular type headache.

Q. Did you ever look at any records from any doctor who extracted any teeth or who did any type of reconstructive work on her teeth relative to this injury?

A. You know, I didn't get any of the dental records, Roger. I'm pretty sure I didn't. I'm paging through here. I don't think I had any of the dental records. That's true. I did not.

Q. As far as what type of medical treatment she may need relative to her dental work that was done, I take it you don't have an opinion on what she may need in the future or what type of follow-up dental care she would receive if the judge determined that would be compensable?

A. I don't have an opinion, Roger. In fact, in my report I said I'm going to leave the dental issues to the dentists.<sup>10</sup>

At the request of claimant's counsel, Peter V. Bieri, M.D., a fellow of the AADEP, performed an evaluation on November 18, 2014. Dr. Bieri took a history, reviewed medical records and performed a physical examination. Dr. Bieri rated claimant's permanent functional impairment at 5 percent to the whole person for claimant's chronic cervicothoracic strain.

According to Dr. Bieri, claimant's TMJ syndrome is not covered specifically in the *Guides*. However, Dr. Bieri testified there is a section of the *Guides* related to impairment of the cranial nerves. Dr. Bieri utilized Table 9, Page 145, which allows from zero to 14 percent to the body for mild impairment to the fifth cranial (trigeminal) nerve. Dr. Bieri rated claimant's permanent impairment to the whole body at 5 percent for claimant's TMJ syndrome. Dr. Bieri also rated a 5 percent whole person impairment for disturbance of mental status and integrative functioning, along with headaches, based on pages 141-143 of the *Guides*. Dr. Bieri combined claimant's three 5 percent ratings, for an aggregate rating of 15 percent to the whole person.

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<sup>10</sup> Fevurly Depo. at 12-14.

Regarding future medical treatment, Dr. Bieri opined claimant will, more likely than not, require completion of her dental reconstruction and conservative treatment for her TMJ, including mouth guards, which claimant now uses. Dr. Bieri did not think claimant will require future treatment for her cervicothoracic strain. Claimant's post-traumatic headaches may require medication at the discretion of a neurologist. Dr. Bieri did not know if claimant's psychiatric symptoms were related to her injury. He noted claimant had a history of depression which may have been aggravated. Claimant might benefit from psychiatric medication.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2012 Supp. 44-501b states in part:

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) provides:

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-508(u) provides:

(u) "Functional impairment" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein.

K.S.A. 2012 Supp. 44-510e(a) and (2)(A) and (B) provide:

(a) In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

...

(2)(A) Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, and amendments thereto.

. . .

(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

K.S.A. 2012 Supp. 44-510h(e) provides in relevant part:

(e) It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

From July 1, 1993 forward, the Board assumed the de novo review of the district courts.<sup>11</sup> Board review of an administrative law judge's order is de novo on the record.<sup>12</sup> "The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made."<sup>13</sup> De novo review, in the context of an administrative hearing, is a review of an existing decision and agency record, with independent findings of fact and conclusions of law.<sup>14</sup>

"It is the function of the [Board] to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and

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<sup>11</sup> See *Nance v. Harvey Cnty.*, 263 Kan. 542, 550-51, 952 P. 2d 411 (1997).

<sup>12</sup> See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P. 2d 501 (1995).

<sup>13</sup> *In re Panhandle E. Pipe Line Co.*, 272 Kan. 1211, 39 P. 3d 21 (2002); see also *Herrera-Gallegos v. H & H Delivery Serv., Inc.*, 42 Kan. App. 2d 360, 363, 212 P. 3d 239 (2009) ("[D]e novo review . . . [gives] no deference to the administrative agency's factual findings.").

<sup>14</sup> *Frick v. City of Salina*, 289 Kan. 1, 20-21, 23-24, 208 P. 3d 739 (2009).

any other testimony which may be relevant to the question of disability.”<sup>15</sup> The Board “is free to consider all of the evidence and decide for itself the percentage of disability.”<sup>16</sup>

### **Nature and Extent of Disability**

The Board finds, per the parties’ stipulation, claimant sustained a 5 percent whole body permanent functional impairment for her cervicothoracic injury.

The Board finds claimant also sustained a 5 percent permanent functional impairment to the whole body for her TMJ syndrome, for a total functional impairment for those injuries of 10 percent to the whole person. Claimant is entitled to PPD on that basis.

Dr. Bieri testified claimant sustained a 5 percent permanent functional impairment for her psychological issues and, in doing so, relied on Chapter 4 of the *Guides*, which concerns the nervous system. Specifically, the doctor relied on Table 2, section 4.1c, which covers “emotional or behavioral disturbances.” That Table allows for a 1 to 14 percent whole person impairment in cases in which “[i]mpairment exists, but ability remains to perform satisfactorily most activities of daily living.” The references in the *Guides* to “mental status” and “emotional or behavioral disturbances” strongly suggest Dr. Bieri rated claimant’s alleged psychological or psychiatric injuries. No psychologist or psychiatrist testified, and neither Dr. Bieri nor Dr. Fevurly was qualified to express admissible opinions in the fields of psychology or psychiatry. The Board finds claimant sustained no permanent injury or functional impairment for her alleged psychological injury.

The physicians who testified in this claim agreed the *Guides* do not specifically cover TMJ syndrome and that dental injuries are generally rateable only for swallowing or chewing. Insofar as claimant’s dental injuries are concerned, Dr. Fevurly testified he would “leave the dental issues to the dentists.”<sup>17</sup> Dr. Fevurly also opined that even if claimant had TMJ related to her accident, he did not think it would be rateable under the *Guides* and would, even if work-related, be rated at 0 percent. However, Dr. Bieri found claimant sustained an injury to her fifth cranial nerve. Dr. Bieri utilized Table 9, Page 145, which allows from 0 to 14 percent to the body for mild impairment to the fifth cranial (trigeminal) nerve. Dr. Bieri rated claimant’s permanent impairment to the whole body at 5 percent for claimant’s TMJ syndrome and nerve injury. There is no evidence Dr. Fevurly considered the portion of the *Guides* on which Dr. Bieri relied, nor is there evidence Dr. Fevurly considered an injury or impairment to claimant’s fifth cranial nerve.

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<sup>15</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 786, 817 P. 2d 212, rev. denied 249 Kan. 778 (1991).

<sup>16</sup> *Id.* at 784.

<sup>17</sup> R.H. Trans. at 14.



The Board finds the opinions of Dr. Bieri regarding impairment are entitled to more weight than those of Dr. Fevurly, and is persuaded claimant sustained a 5 percent permanent impairment of function to the whole body for her TMJ and nerve injuries, including her headaches.

### **Future Medical**

Neither testifying physician indicated claimant will require future treatment for her cervicothoracic strain. Claimant is entitled to no compensation for her alleged psychological injuries and that denial encompasses future medical treatment. However, Dr. Bieri's testimony, which the Board finds is entitled to the most weight, supports the conclusion that claimant will require future dental treatment and care for her TMJ and associated symptoms, including headaches. The Board finds claimant overcame the presumption that her right to medical treatment was terminated when she reached MMI. Claimant is entitled to future treatment, on application to and approval by the ALJ, for her headaches, dental injuries and symptoms associated with her TMJ and nerve injury.

### **CONCLUSIONS**

1. Claimant is entitled to a 10 percent PPD based on a 5 percent whole body permanent functional impairment to her cervicothoracic injury and a 5 percent permanent functional impairment to the whole body for her TMJ dysfunction and nerve injury.
2. Claimant sustained no permanent injury or functional impairment for her alleged psychological injury.
3. Claimant is entitled to future medical treatment as detailed in this Order.

### **AWARD**

Claimant is entitled to 41.50 weeks of permanent partial disability compensation at the rate of \$142.85 per week or \$5,928.28 for a 10 percent functional disability, or a total award of \$5,928.28.

As of September 8, 2016, there would be due and owing to the claimant 41.50 weeks of permanent partial disability compensation at the rate of \$142.85 per week in the sum of \$5,928.28 for a total due and owing of \$5,928.28, which is ordered paid in one lump sum less amounts previously paid.

**WHEREFORE**, the Board finds the Award of Administrative Law Judge Rebecca A. Sanders dated March 3, 2016, is modified as set forth in this Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2016.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Honorable Rebecca A. Sanders, Administrative Law Judge